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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER WAYNE OLIVER,

Defendant and Appellant.

C081847

(Super. Ct. Nos. CR20131316,  
MF036585C )

Defendant Christopher Wayne Oliver joined his friend Michael Roessler at a bar in rural San Joaquin County after Roessler became involved in an argument with another man, Michael Lawrence. At Roessler's request, defendant brought him a large caliber handgun. The two then rode motorcycles into the nearby neighborhood where Lawrence lived, revving their engines until he and his wife came into the road. Defendant and Lawrence immediately came to blows; defendant also struck the wife with his motorcycle helmet when she tried to intervene. Roessler then fired two or three rounds at Lawrence, hitting him in the neck and also hitting defendant in the hand and abdomen. Defendant

and Roessler fled on the motorcycles. Both men ended up at the hospital that night, defendant from the gunshot wounds, Roessler after crashing his motorcycle. Lawrence bled to death on the pavement in front of his house.

Defendant was convicted by jury of first degree murder, conspiracy to commit murder, and assault by means of force likely to produce great bodily injury. With respect to the murder and conspiracy counts, the jury also found true an allegation that a principal in the commission of these crimes was armed with a firearm. The trial court sentenced defendant to serve an indeterminate term of 25 years to life in state prison plus a consecutive determinate term of two years.

On appeal, defendant (1) challenges the sufficiency of the evidence supporting his first degree murder and conspiracy to commit murder convictions. He also contends: (2) the trial court prejudicially erred and violated his federal constitutional rights by declining to instruct the jury that one of the prosecution's witnesses, Justin Wilson, who was also at the bar with Roessler that night, both of whom were also charged with first degree murder and conspiracy to commit murder,<sup>1</sup> was an accomplice as a matter of law; (3) the trial court also prejudicially abused its discretion and further violated defendant's constitutional rights by admitting evidence of text messages between defendant, Roessler, and Wilson concerning Wilson's attempt to buy a different gun from defendant earlier in

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<sup>1</sup> Roessler and Wilson were tried together in a separate proceeding. Roessler was convicted of second degree murder and acquitted of conspiracy to commit murder. Wilson was acquitted of both murder and conspiracy to commit murder, but was convicted of two separate weapons possession charges.

the day Lawrence was murdered; and (4) the prosecutor engaged in several forms of prejudicial prosecutorial misconduct.<sup>2</sup>

We affirm. The evidence is sufficient to support defendant's convictions. The trial court did not err in declining to instruct the jury that Wilson was an accomplice as a matter of law. Nor did the trial court abuse its discretion or violate defendant's federal constitutional rights by admitting the challenged text message evidence. Defendant's claims of prosecutorial misconduct are forfeited for failure to object and ask for curative instructions. However, anticipating forfeiture, defendant alternatively asserts his trial counsel provided constitutionally deficient assistance by failing to so object. While we agree misconduct occurred, we conclude it was harmless and therefore reject defendant's assertion of ineffective assistance of counsel.

#### FACTS

In June 2013, Lawrence lived with his wife, E., and two daughters in a small neighborhood located in the rural outskirts of Manteca. A fence with an electronic sliding gate separated the front yard and driveway from the main road. A short distance down that road, situated on the San Joaquin River, was the Turtle Beach Resort.

On June 22, Lawrence got home from work around 4:00 p.m. and began washing his car in the driveway. He planned to bring his family to Turtle Beach later in the afternoon to meet up with a friend, M., and his family. As Lawrence washed the car, E.'s sister and brother-in-law, A. and G., stopped by the house. A. was driving a small black SUV. Their neighbor, J., was also in the vehicle. After some discussion, E. and their youngest daughter got into the SUV and went to Turtle Beach with them while Lawrence

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<sup>2</sup> Defendant also challenges the trial court's order of direct victim restitution. However, because defendant did not separately appeal from that order, these claims are not cognizable in this appeal. (*People v. Denham* (2014) 222 Cal.App.4th 1210, 1214.)

finished washing the car. M. and his family were already at Turtle Beach when A.'s carload arrived. Lawrence arrived on a dirt bike about an hour later.

M. barbequed and most of the adults noted above drank alcohol while at Turtle Beach. At some point, Lawrence got on his dirt bike wearing a backpack and rode to a bar about a mile away to buy some more beer. When he got there, Roessler and Wilson were sitting at the bar. They were in their 20s and arrived at the bar on Harley Davidson motorcycles.<sup>3</sup> Lawrence, who was in his early 50s, asked the bartender for a six-pack of Corona to go. As the bartender retrieved a six-pack to make the sale, Roessler told Lawrence it would be cheaper to buy beer at a store. Roessler then said to Wilson, "nothing but fags and molesters live around here." Overhearing the comment, Lawrence responded: "I live around here." Roessler said: "No offense to you. . . . [T]hat's just what lives around here." Lawrence paid for the beer, put it in the backpack, and returned to his family and friends on the dirt bike.

Lawrence was upset when he got back to Turtle Beach. After telling his friend M. what had happened at the bar, the two got on the dirt bike and rode to Lawrence's house. E. believed her husband planned to return to the bar and ran after the bike. A. believed the same and got into the SUV to pick up her sister and continue the pursuit. J. also joined them. When Lawrence and M. got to the house, Lawrence parked the bike in the garage. As they got into Lawrence's car to return to the bar, A. pulled up in the SUV and told them to get in. She then drove the fivesome to the bar herself.

At the bar, Lawrence went in alone while the rest of the group waited outside. Lawrence approached Roessler, who was still seated at the bar with Wilson, and asked: "Did you call me a faggot?" Additional words were exchanged, after which Roessler and

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<sup>3</sup> Wilson's girlfriend was expected to give birth to their first child that day, so Wilson and Roessler went "bar hopping" to celebrate.

Wilson followed Lawrence outside. Wilson believed Roessler and Lawrence were going to fight and stood off to the side as “back up.” Other bar patrons also came out hoping to see a fight. When Wilson got outside, J. approached him quickly and said: “Do you got a problem?” Wilson responded that the problem was between Roessler and Lawrence. Wilson and J. then watched as Roessler and Lawrence argued in front of the bar, squaring up and “circling around” each other as they did so. At the same time, E. and A. were yelling at Roessler. E. pushed him away from her husband and A. yelled, among other things, “he’s older than you” and, “did anyone not teach you to respect your elders[?]” A couple minutes after it began, the confrontation between Roessler and Lawrence in front of the bar ended with them shaking hands. Roessler and Wilson went back inside the bar and Lawrence’s group went back to Turtle Beach.

At this point in the narrative, timing begins to become important to defendant’s sufficiency of the evidence claims. Defendant arrived at the bar at around 8:30 p.m. He and Roessler were close friends. While Wilson had only recently made defendant’s acquaintance, the three had ridden motorcycles together on two previous occasions and Wilson had attempted to buy a gun from defendant earlier in the day. About an hour before defendant’s arrival, Roessler called him and said he called someone at the bar a “chomo,” by which he meant, “a gay child molester.” He also told defendant where he and Wilson were drinking and asked him to bring a gun if he decided to join them.<sup>4</sup>

It is unclear whether this phone call occurred before or after Lawrence returned to the bar to confront Roessler. However, after that confrontation, back inside the bar, a couple of the bar’s patrons suggested Lawrence might come back with more people.

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<sup>4</sup> According to defendant, the gun belonged to Roessler and defendant was cleaning and repairing it for him.

According to Wilson, this “seemed to rile up” Roessler, who was already “frustrated” by the incident and “irritated” that one of the women had pushed him; Wilson believed these patrons were just “stirring the pot.” Several minutes later, Roessler told Wilson to call defendant to ask whether he would be bringing a gun. During that conversation, Wilson told defendant about the confrontation with Lawrence.<sup>5</sup>

At 7:56 p.m., defendant sent Roessler a text message saying: “Try to push start this bike will be their[.]”<sup>6</sup> At 8:03 p.m., defendant sent Roessler another text message saying: “You want some heat[?]” Roessler responded: “Ya[.]” Defendant replied: “No[.]” Roessler responded: “No what[?]” Defendant replied: “You ya what that mean no[.]” Then, at 8:10 p.m., defendant sent Roessler another text message asking: “Want me to bring a gun for you[?]” Roessler did not respond. A couple minutes later,

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<sup>5</sup> The cell phone records do not indicate a call between Wilson’s cell phone and defendant’s cell phone during this time period, but rather one at 5:26 p.m., lasting only six seconds, and one at 8:43 p.m., lasting only five seconds. However, 2 phone calls were made between Roessler’s cell phone and defendant’s cell phone, one at 7:31 p.m., lasting 1 minute, 8 seconds, and another at 7:41 p.m., lasting 6 minutes, 21 seconds. This evidence can be harmonized with Wilson’s testimony if the first call between Roessler’s cell phone and defendant’s cell phone, at 7:31 p.m., was the call Roessler made and during which he told defendant about insulting Lawrence, and the second call between these phones was Wilson’s call to defendant during which he told defendant about the confrontation. Under this view of the evidence, it is possible the first call was made after the initial interaction with Lawrence and the second call was made after the subsequent confrontation, leaving only 10 minutes between incidents with Lawrence. However, as mentioned, the bar and Turtle Beach were only about one mile apart. It is also possible both calls were made after the confrontation, and during the 10 minutes between the calls Roessler was becoming more agitated about the situation by the bar patrons’ speculation about Lawrence coming back with more people. Either way, viewing the evidence in the light most favorable to the verdict, as we must, defendant was aware of the confrontation before 8:00 p.m.

<sup>6</sup> Aside from adding ending punctuation, we provide the various text messages sent between the parties verbatim.

defendant sent Wilson a text message asking: “You still out their[?]” Wilson responded: “Yup waitin on u[.]” Defendant asked: “Does he want me to bring him a gun[?]” Wilson responded: “Yeah[.]” Defendant replied: “Ok on the way[.]” At 8:22 p.m., defendant again messaged Wilson saying he was on his way, followed at 8:25 p.m. by: “On 99 in manteca” and “5 min[.]” One minute later, defendant messaged Roessler with: “Be their in 5 min tuck the car[.]”

Around the time the bar patrons were talking about Lawrence coming back, Roessler also called another friend, David Delgado, and asked him to come down to the bar. Delgado drove to the bar in his grandmother’s van and arrived shortly before defendant got there. When defendant arrived, he gave Roessler a loaded .45-caliber handgun. Wilson overheard defendant and Roessler talking about the confrontation with Lawrence. A short time later, Roessler asked Wilson to borrow his motorcycle so that defendant could ride Roessler’s motorcycle. Wilson agreed, claiming initially in his testimony that he did not know where they intended to go, but then acknowledging they said, “they were going to go down there,” meaning into the small neighborhood between the bar and Turtle Beach, “to go see if they’re down there.” Wilson also acknowledged seeing a portion of the butt of a handgun protruding from Roessler’s pocket as they were leaving.

Meanwhile, as mentioned, after leaving the bar following the confrontation with Roessler, Lawrence and his group returned to Turtle Beach. M. and his family left shortly after they got back from the bar. The rest of the group decided to go to Lawrence’s house to continue drinking and socializing there. But first, they drove to a store in Manteca to buy food and more alcohol. On the way to the store, they drove past the bar. A. saw Roessler and Wilson outside. J. saw, as he put it, “somebody flipped us off.” The sun was setting when they made the trip to the store, which was about 8:30 p.m. that night. It was dark outside when they got back to the house. Five to ten

minutes after their return, the group heard the sound of motorcycles approaching the neighborhood and revving their engines.

Roessler and defendant rode past Lawrence's house and turned down a street behind the house, where they briefly stopped their motorcycles before turning around and riding past the house again. Lawrence and most of his guests were outside the house when the motorcycles made their passes, including J., who threw a beer can at them as they drove by the first time. E. was inside the house, but came outside when she heard the motorcycles and saw her husband opening the electronic gate separating the driveway from the road. She followed him into the road, making it out of the gate just before it closed behind her. The riders parked their motorcycles in the street, facing away from the house.

Lawrence approached defendant and said, "I told you motherfuckers earlier." Defendant responded: "You didn't tell me fucking shit." As Lawrence came closer, defendant swung his motorcycle helmet at him. A fistfight between the men followed. When E. tried to intervene, defendant hit her in the head with the helmet, knocking her to the ground. As she got to her feet, E. saw her husband fighting with both defendant and Roessler. Roessler then lifted his shirt and pulled out the gun he brought with him, pointing it at Lawrence. A., still in the front yard, saw the gun and yelled: "He has a gun, he has a gun." Roessler fired two or three rounds, striking Lawrence in the left side of the neck, severing the jugular vein. Lawrence fell to the ground immediately. Roessler quickly returned to his motorcycle and rode away, followed by defendant. A. called 911 while other members of Lawrence's group, including his wife, ran to his side. Lawrence bled to death before emergency medical personnel arrived on the scene.

Back at the bar, Wilson and Delgado were getting into Delgado's van to leave when they heard gunshots. Within a matter of seconds, Wilson saw Roessler "fly by" on his motorcycle. As Wilson and Delgado were pulling onto the road in front of the bar,

defendant slowly approached on Roessler's motorcycle holding his stomach. Delgado stopped the van and Wilson got out to find out what was going on. Defendant was "bleeding profusely." He had also been hit by at least one of the rounds Roessler fired at Lawrence; one bullet passed clean through his hand, while the same or another bullet struck him in the abdomen. Wilson helped defendant off of the motorcycle and into the van. Delgado then drove defendant to the hospital. Shortly after passing by the bar, Roessler crashed Wilson's motorcycle in a corn field when the road he was on came to a dead end. He too was transported to the hospital and treated for injuries.

We finally note the .45-caliber handgun Roessler used to murder Lawrence was recovered from a ditch across the street from the Lawrence residence. The gun had one live round in the chamber and two in the attached magazine. DNA matching that of defendant was found on the magazine. An empty shell casing recovered near Lawrence's body was determined to have been fired by that gun. Two motorcycle helmets, one of which had its visor broken off, were also found in front of the Lawrence residence. DNA matching that of Roessler was found on the liner of one of the helmets.

Where relevant to the issues raised in this appeal, we set forth evidence adduced during the defense case, including defendant's testimony, in the discussion portion of the opinion, to which we now turn.

## DISCUSSION

### I

#### *Sufficiency of the Evidence*

Defendant challenges the sufficiency of the evidence supporting his first degree murder and conspiracy to commit murder convictions. We conclude the evidence is sufficient to support these convictions.

**A.**

***Standard of Review***

“ ‘In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]’ [Citations.] All conflicts in the evidence and questions of credibility are resolved in favor of the verdict, drawing every reasonable inference the jury could draw from the evidence. [Citation.] Reversal on this ground is unwarranted unless ‘ “upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” ’ [Citation.] This standard applies whether direct or circumstantial evidence is involved. [Citation.]” (*People v. Cardenas* (2015) 239 Cal.App.4th 220, 226-227.)

**B.**

***First Degree Murder***

Defendant argues the evidence is insufficient to establish he intended to aid and abet the commission of a first degree murder. We disagree.

“Murder is the unlawful killing of a human being . . . with malice aforethought.” (Penal Code, § 187, subd. (a).)<sup>7</sup> “Such malice may be express or implied.” (Former § 188; Stats. 1982, ch. 893, § 4.) Express malice “requires an *intent to kill* that is ‘unlawful’ because . . . ““there is no justification, excuse, or mitigation for the killing recognized by the law.”” [Citation.] [¶] Malice is implied when an unlawful killing results from a willful act, the natural and probable consequences of which are dangerous

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<sup>7</sup> Undesignated statutory references are to the Penal Code.

to human life, performed with conscious disregard for that danger.” (*People v. Elmore* (2014) 59 Cal.4th 121, 133.)

“All persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed.” (§ 31.) “If the defendant himself [or herself] commits the offense, he [or she] is guilty as a direct perpetrator. If he [or she] assists another, he [or she] is guilty as an aider and abettor.” (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) “[A]ider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator’s actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor’s mens rea—knowledge of the direct perpetrator’s unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor’s actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime.” (*Ibid.*) The latter aiding and abetting requirement is satisfied where the aider and abettor “by act or advice aids, promotes, encourages or instigates, the commission of the crime.” (*People v. Beeman* (1984) 35 Cal.3d 547, 561.)

Here, the prosecution did not pursue a direct perpetrator theory of first degree murder against defendant. Nor is there any evidence in the record supporting such a theory. Roessler was the one who shot Lawrence to death in front of his house. However, if defendant “aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission,” he is guilty of murder; if he did so “willfully, deliberately, and with premeditation,” that murder is of the first degree. (*People v. Chiu* (2014) 59 Cal.4th 155, 167.)

Defendant’s argument on appeal does not dispute the evidence was sufficient to establish the direct perpetrator’s actus reus, i.e., Roessler’s commission of a first

degree murder.<sup>8</sup> Nor does he challenge the sufficiency of the evidence to establish his own actus reus as an aider and abettor, i.e., his conduct aiding Roessler in the achievement of that crime. By defendant's own admission, he supplied Roessler with the murder weapon. Instead, defendant challenges the sufficiency of the evidence to prove the requisite mens rea. This requires evidence from which a reasonable jury could infer defendant (1) knew Roessler intended to murder Lawrence, and (2) made a willful, deliberate, and premeditated decision to assist him in doing so. (See *People v. Perez, supra*, 35 Cal.4th at p. 1225.) However, if the evidence is sufficient to establish only that defendant intended to aid and abet an assault on Lawrence, a natural and probable consequence of which was murder, we must modify the judgment to reflect conviction of second degree murder. As our Supreme Court recently held, "punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine." (*People v. Chiu, supra*, 59 Cal.4th at p. 166.)

We conclude the evidence is sufficient to support the jury's implied finding defendant possessed the requisite mens rea for first degree murder as an aider and abettor. In this regard, the jury was correctly instructed: "The defendant is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. [¶] The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with

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<sup>8</sup> The fact that Roessler's jury convicted him in a separate trial of second degree murder is immaterial. We are here concerned only with the sufficiency of the evidence *in this trial* supporting defendant's first degree murder conviction.

premeditation if he decided to kill before completing the act that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.”

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), our Supreme Court noted three types of evidence typically provide support to a murder conviction based on premeditation and deliberation, i.e., planning activity, motive, and manner of killing. “[T]o sustain a verdict of premeditated and deliberate murder, [*Anderson*] required (1) extremely strong evidence of planning, (2) evidence of motive in conjunction with evidence of planning or of a calculated manner of killing, or (3) evidence of all three indicia of premeditation and deliberation.” (*People v. Memro* (1995) 11 Cal.4th 786, 863; see *Anderson, supra*, at p. 27.) However, in *People v. Perez* (1992) 2 Cal.4th 1117 (*Perez*), our Supreme Court cautioned that “*Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation.” (*Perez* at p. 1125.) Since *Perez*, the court has cautioned on multiple occasions, “ ‘[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate. The *Anderson* analysis was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way.’ [Citation.] In other words, the *Anderson* guidelines are descriptive, not normative. ‘The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to

finding first degree premeditated murder, nor are they exclusive.’ [Citation.]” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081; see also *People v. Hovarter* (2008) 44 Cal.4th 983, 1019.)

In this case, there was strong evidence defendant aided and abetted Roessler in committing a first degree murder. With respect to motive, Wilson testified Roessler was frustrated by the confrontation with Lawrence and irritated he was pushed by a woman outside the bar. After that confrontation, some of the bar’s patrons suggested Lawrence might come back with more people, further aggravating Roessler. Several minutes later, Roessler told Wilson to call defendant to ask whether he would be bringing the gun Roessler had previously asked defendant to bring to the bar. During that conversation, Wilson told defendant about the confrontation with Lawrence. Thus, while it is unclear whether the conversation between Roessler and defendant, in which Roessler initially asked for the gun, occurred before or after the confrontation with Lawrence, the jury could have reasonably inferred the 8:03 p.m. text message from defendant to Roessler asking, “You want some heat[?]” was sent after he learned of that confrontation from Wilson. Roessler responded: “Ya[.]” A further reasonable inference is that whereas Roessler’s anger and frustration following the confrontation supplied him with motive to murder Lawrence (see, e.g., *People v. Wright* (1985) 39 Cal.3d 576, 593 [jury could reasonably infer a confrontation with the victim provided the defendant with motive to murder him in retaliation]), defendant’s friendship with Roessler supplied him with motive to help him do so. (See *People v. Nguyen* (1993) 21 Cal.App.4th 518, 534 [an aider and abettor “might act out of friendship with the perpetrator”].)

With respect to planning, in addition to Roessler asking defendant to bring him a gun, in a text message exchange between defendant and Wilson, defendant confirmed with Wilson that Roessler wanted him to bring a gun to the bar, after which defendant said he was on his way and provided both Wilson and Roessler with updates as to his

estimated time of arrival. When defendant arrived, he handed Roessler a loaded .45-caliber handgun. The two then discussed the confrontation, after which they rode into the neighborhood where Lawrence lived. Roessler did not know Lawrence's address, only that he lived in the area. So Roessler and defendant revved their engines as they rode through the neighborhood. A reasonable jury could have inferred they did so in order to announce their presence in the hope that Lawrence would come out to confront them. That is exactly what happened. As in *People v. Wright, supra*, 39 Cal.3d 576, obtaining a loaded firearm and seeking out the victim constitutes evidence of planning activity from which the jury could reasonably find premeditation. (*Id.* at pp. 592-593.)

Finally, with respect to manner of killing, shooting Lawrence at close range with a large caliber handgun "could well support an inference by the jury that the manner of killing was 'particular and exacting.'" (*People v. Wright, supra*, 39 Cal.3d at p. 594.) Based on the foregoing evidence, a reasonable jury could have concluded beyond a reasonable doubt that Roessler murdered Lawrence with premeditation and deliberation and defendant, knowing of Roessler's intent and possessing the same mental state, aided and abetted him in doing so.

Nevertheless, defendant claims the following evidence fatally undercuts such a conclusion. First, defendant argues, had he known Roessler intended to murder Lawrence, he would not have gotten into a fistfight with the intended victim, thereby placing himself in the line of fire. While this was certainly something for the jury to consider, it does not undermine their conclusion defendant possessed knowledge of Roessler's intent. Based on all of the testimony, the events in front of Lawrence's house transpired very quickly. As defendant and Roessler parked the motorcycles, Lawrence came into the street and angrily approached them, exchanging heated words with defendant as he did so. Defendant and Lawrence came to blows. E. intervened and was hit with the motorcycle helmet. The fighting between defendant and Lawrence

continued. Roessler pulled out the gun and fired. From this sequence of events, the jury could have reasonably concluded defendant got into the fistfight with Lawrence, not because he was unaware Roessler intended to murder him, but because Lawrence brought the fight to him as he was parking his motorcycle. Indeed, defendant's own testimony supports such a conclusion. Defendant testified he got into the fight with Lawrence because he thought Lawrence was going to hit him. And while defendant denied any knowledge of Roessler's intent, the jury was not obligated to believe this portion of his testimony. Simply put, getting into a fistfight with Lawrence does not negate the evidence, recited above, supporting the jury's conclusion defendant knew Roessler intended to murder Lawrence.

Second, defendant claims Wilson's testimony that he told defendant to bring a gun to the bar at Roessler's request after the confrontation between Roessler and Lawrence "cannot be true" because the phone records admitted into evidence showed a single call from Wilson to defendant at 5:26 p.m., more than two hours before that confrontation. However, it is entirely possible Wilson used Roessler's cell phone to make the call to defendant. As previously stated in greater detail, there were two calls between Roessler's cell phone and defendant's cell phone, one at 7:31 p.m., lasting a little over 1 minute, and another at 7:41 p.m., lasting over 6 minutes. This evidence can be harmonized with Wilson's testimony if the first call between these phones was the call Roessler made and during which he told defendant about insulting Lawrence, and the second call was Wilson's call to defendant during which he told defendant about the confrontation and asked whether he would be bringing Roessler a gun.

Third, based on Wilson's testimony the confrontation with Lawrence occurred after he closed his first bar tab, together with the time stamp of 8:15 p.m. on that bar tab, defendant dismisses the text messages that were exchanged between defendant and Roessler and Wilson between 8:03 p.m. and 8:14 p.m. However, the jury was

not required to credit Wilson's estimation of when the confrontation occurred in relation with his closing of a bar tab. Moreover, for reasons already expressed, the jury could reasonably have concluded the 8:03 p.m. text message from defendant to Roessler asking, "You want some heat[?]" was sent after he learned of Roessler's confrontation with Lawrence. Indeed, defendant's self-serving testimony notwithstanding, it makes little sense for him to ask Roessler such a question unless he was aware of a problem.

We conclude the evidence is sufficient to support defendant's first degree murder conviction.

### C.

#### ***Conspiracy to Commit Murder***

Defendant also argues the evidence is insufficient to establish he entered into a conspiracy to murder the victim. We are not persuaded.

"The crime of conspiracy is defined . . . as 'two or more persons conspir[ing]' '[t]o commit any crime,' together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance thereof. [Citations.] 'Conspiracy is a "specific intent" crime. . . . The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree *but also that they intended to commit the elements of that offense.*' [Citation.]" (*People v. Swain* (1996) 12 Cal.4th 593, 599-600.) However, " 'it is not necessary to establish the parties met and expressly agreed' to commit the target offense. [Citation.] Rather, ' "a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design." ' [Citation.] Thus, ' "a conspiracy may be

inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]” ’ [Citations.]” (*People v. Tran* (2013) 215 Cal.App.4th 1207, 1221.) Indeed, “[c]ircumstantial evidence often is the only means to prove conspiracy.” (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 999; see also *People v. Osslo* (1958) 50 Cal.2d 75, 94-95.)

We have already set forth the elements of the crime of murder, the target offense of the conspiracy at issue in this case. We simply add that “a conviction of conspiracy to commit murder requires a finding of intent to kill, and cannot be based on a theory of implied malice.” (*People v. Swain, supra*, 12 Cal.4th at p. 607.)

The evidence supporting defendant’s first degree murder conviction is also adequate to support his conviction for conspiracy to commit murder. We decline to recite that evidence again in any detail. We do note defendant does not challenge the sufficiency of the evidence supporting the jury’s conclusion at least one of the overt acts charged in the information was committed by one of the alleged conspirators. Each was supported by substantial evidence. With respect to the required mens rea, we have already concluded the jury could have reasonably found intent to kill. The evidence also supports a reasonable inference defendant intended to agree or conspire with Roessler to do so. Stated briefly, after learning of the confrontation with Lawrence, defendant asked his friend whether he wanted “some heat.” Roessler indicated he did. Defendant then brought his friend a loaded .45-caliber handgun, and after discussing the confrontation, the two rode motorcycles into Lawrence’s neighborhood in search of their target. From this conduct and the relationship between defendant and Roessler, the jury was justified in concluding defendant possessed the intent to agree or conspire to murder Lawrence.

We conclude the evidence is sufficient to support defendant’s conspiracy to commit murder conviction.

## II

### ***Instruction Regarding Accomplice Testimony***

Defendant contends the trial court prejudicially erred and violated his federal constitutional rights by declining to instruct the jury that Wilson was an accomplice as a matter of law. He is mistaken.

#### A.

##### ***Additional Background***

After both sides rested, defense counsel requested that the trial court instruct the jury with CALCRIM No. 335. This instruction, titled, “Accomplice Testimony: No Dispute Whether Witness Is Accomplice,” would have informed the jury that if the charged crimes were committed, Wilson was an accomplice to those crimes. (CALCRIM No. 335.) The instruction would then have informed the jury how to evaluate the testimony of an accomplice. (*Ibid.*)

Rather than provide this instruction, the trial court instructed the jury with CALCRIM No. 334, titled, “Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice.” (CALCRIM No. 334.) This instruction also informed the jury how to evaluate accomplice testimony, but began by stating: “Before you may consider the statement or testimony of Justin Wilson as evidence against the defendant regarding the [charged crimes], you must decide whether [Wilson] was an accomplice to those crimes. [¶] A person is an accomplice if he is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if, one, he personally committed the crime; or, two, he knew of the criminal purpose of the person who committed the crime; and, three, he intended to and did, in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime, or participate in a criminal conspiracy to commit the crime. The burden is on the defendant to prove that it is more likely than not that Justin Wilson was an

accomplice. [¶] An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he is present at the scene of a crime, even if he knows that a crime will be committed or is being committed and does nothing to stop it.” (*Ibid.*)

In choosing CALCRIM No. 334 as the appropriate instruction, the trial court explained: “I don’t think you can say as a matter of law that Justin Wilson is an accomplice,” noting, “he was found not guilty and the jury knows he was found not guilty. So I think we should give [CALCRIM No.] 334. And the jury will decide whether he’s an accomplice or not.”

## **B.**

### ***Analysis***

“An accomplice is someone subject to prosecution for the charged crimes by reason of aiding and abetting or being a member of a conspiracy to commit the charged crimes.” (*People v. Houston* (2012) 54 Cal.4th 1186, 1224.) “No conviction can be had upon the testimony of an accomplice unless such testimony is corroborated by other evidence tending to connect the defendant with the commission of the offense . . . . Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed.” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103.) “Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness’s criminal culpability are ‘clear and undisputed.’ [Citations.]” (*People v. Williams* (1997) 16 Cal.4th 635, 679 (*Williams*).)

In *Williams, supra*, 16 Cal.4th 635, the defendant argued the trial court erred by declining to instruct the jury that two witnesses, one of whom drove the defendant to the scene of the murders and the other helped him dispose of the murder weapon, were both accomplices as a matter of law. Our Supreme Court disagreed. Acknowledging there

was evidence the witnesses were accomplices, the court explained: “But this evidence of [the witnesses’] criminal culpability was not so clear and undisputed that a single inference could be drawn that either one would be liable for the ‘*identical offense[s]*’ charged against defendant, namely, four counts of special circumstance murder. Accordingly, the trial court properly left it to the jury to decide whether either [witness] was an accomplice.” (*Id.* at pp. 679-680.)

Similarly, here, Wilson’s status as an accomplice was neither clear nor undisputed. He may well have been, and was charged with the identical offenses in a separate trial. However, that alone does not establish him to be an accomplice as a matter of law any more than the acquittal in that previous trial would have prevented the jury from finding him to be an accomplice for purposes of evaluating his testimony in this one. (*People v. Gordon* (1973) 10 Cal.3d 460, 469, overruled on another ground by *People v. Ward* (2005) 36 Cal.4th 186, 212.) It was for the jury to determine whether or not Wilson was an accomplice. The trial court did not err in so instructing the jury.

### **III**

#### ***Evidence of Wilson’s Attempt to Buy a Gun From Defendant***

Defendant also claims the trial court prejudicially abused its discretion and violated his constitutional rights by admitting evidence of text messages between defendant, Roessler, and Wilson concerning Wilson’s attempt to purchase a different gun from defendant earlier in the day Lawrence was murdered. We are not persuaded.

#### **A.**

##### ***Additional Background***

The challenged text messages were sent over the span of about 20 minutes around 4:00 p.m. the day Lawrence was murdered. In the exchange, Wilson asked Roessler to tell defendant to “get that 32,” referring to a .32-caliber firearm he wanted to buy from

defendant. Roessler responded by pretending he had already purchased the weapon from defendant. Wilson replied: “Son of a bitch was spose to sell it to me[.]” Defendant then sent a text message to Wilson, also pretending he sold the gun to Roessler. Defendant and Wilson also discussed a previous unsuccessful gun sale between Wilson and Roessler in which Roessler wanted \$140 as a down payment but Wilson could only come up with \$100. Defendant told Wilson he sold the .32-caliber firearm to Roessler because Roessler told him he was selling it to Wilson for \$140. Wilson responded: “Yea I want the 32 but he nvr sed anything about it[.]”

The trial court admitted the challenged evidence over defense counsel’s objections that the text messages were inadmissible hearsay and amounted to improper character evidence, explaining the statements made in the messages (1) were admissible under the exception to the hearsay rule for admissions of co-conspirators, and (2) were admissible under Evidence Code section 1101, subdivision (b), “to show . . . motive, identity, opportunity, intent, preparation, common plan or design. In other words, they were planning on getting guns from the defendant for some other purpose, and that was just three hours, maybe four hours before this incident with the victim. [¶] So it’s very, very close in time, and I think it’s extremely relevant to show that they were predisposed to obtain firearms, and then when they needed a firearm to carry out the conspiracy to kill [Lawrence], that they knew that the defendant could provide a firearm, and then with greater urgency they wanted to obtain one and did.” The trial court also ruled the evidence was admissible under Evidence Code section 352.

## **B.**

### ***Analysis***

Defendant challenges the trial court’s ruling only with respect to admissibility under the co-conspirator exception to the hearsay rule.

With many exceptions, hearsay evidence, i.e., “evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated,” is inadmissible. (Evid. Code, § 1200.) “Under this definition, as under existing case law, a statement that is offered for some purpose other than to prove the fact stated therein is not hearsay.” (Sen. Com. on Judiciary, com., reprinted at 29B pt. 4 West’s Ann. Evid. Code (2015 ed.) foll. § 1200, p. 3.) One of the exceptions to the hearsay rule is for statements made by a co-conspirator in furtherance of the objective of the conspiracy. (See Evid. Code, § 1223.)

Defendant argues the challenged statements are hearsay and did not fall within the above exception to the hearsay rule. The Attorney General argues the statements are not hearsay at all because they were not offered to prove the truth of the statements. We agree with the Attorney General and do not address the co-conspirator exception.

Roessler’s statement to Wilson that he bought the .32-caliber gun from defendant was not offered to prove Roessler did in fact buy the gun. Similarly, defendant’s statement to Wilson that Roessler “came and got [the gun] for you” was not offered to prove Roessler actually bought the gun from defendant in order to sell it to Wilson. It appears both defendant and Roessler were teasing Wilson with these statements. So too with respect to Wilson’s statements to both Roessler and defendant indicating he wanted the gun (“get that 32” and “I want the 32”) and his statement to Roessler indicating defendant had agreed to sell him the gun (“Son of a bitch was spose to sell it to me”). As the Attorney General points out, these statements were not offered for their truth, i.e., Wilson in fact wanted the gun or that defendant in fact agreed to sell it to him; instead, the “inquir[y] about obtaining a gun from [defendant]” hours before the murder was offered to establish circumstantially “that Wilson and Roessler believed [defendant] had

access to guns” and could supply one to murder Lawrence. Such a belief tends in reason to make it more likely that was the reason they contacted him that night.

Indeed, this case is similar to cases in which phone calls are made inquiring about placing bets or purchasing narcotics and those inquiries are admitted not for their truth, i.e., the caller in fact wanted to place a certain amount of money on a certain outcome or purchase a certain amount of drugs for a certain price, but to establish circumstantially that illicit use was being made of the location in question. (See, e.g., *People v. Fischer* (1957) 49 Cal.2d 442, 447; *People v. Ventura* (1991) 1 Cal.App.4th 1515, 1519; *People v. Nealy* (1991) 228 Cal.App.3d 447, 450; *People v. Carella* (1961) 191 Cal.App.2d 115, 139-140.)

Finally, we are left with the statements between Wilson and defendant concerning Wilson’s previous attempt to purchase a gun from Roessler. As mentioned, Wilson told defendant the details of that attempted transaction, after which defendant told Wilson that Roessler told him Wilson was buying the .32-caliber gun from him for \$140. While the latter statement contains two layers of potential hearsay, as with the other statements analyzed above, we conclude none of these statements were offered for their truth. Instead, as the Attorney General argues, the statements were offered to establish that Roessler and Wilson “did not contact [defendant] for the innocent purpose of coming to the bar to have drinks.”

The trial court neither abused its discretion nor violated defendant’s constitutional rights in admitting the challenged statements into evidence.

#### **IV**

##### ***Prosecutorial Misconduct***

Finally, defendant asserts the prosecutor engaged in several forms of prosecutorial misconduct. These assertions are forfeited and, in any event, harmless.

**A.**

***Forfeiture***

“ ‘To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his [or her] objection, and ask the trial court to admonish the jury.’ [Citation.] There are two exceptions to this forfeiture: (1) the objection and/or the request for an admonition would have been futile, or (2) the admonition would have been insufficient to cure the harm occasioned by the misconduct. Forfeiture for failure to request an admonition will also not apply where the trial court immediately overruled the objection to the alleged misconduct, leaving defendant without an opportunity to request an admonition.” (*People v. Panah* (2005) 35 Cal.4th 395, 462.)

Defendant acknowledges his trial counsel did not object to any of the claimed misconduct urged in this appeal and does not argue one of the exceptions to forfeiture applies. Instead, he argues his trial counsel provided constitutionally deficient assistance by failing to so object. We must therefore view defendant’s claims of prosecutorial misconduct through the lens of assessing ineffective assistance of counsel.

**B.**

***Standard of Review***

A criminal defendant has the right to the assistance of counsel under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) This right “entitles the defendant not to some bare assistance but rather to *effective* assistance. [Citations.] Specifically, it entitles him [or her] to ‘the reasonably competent assistance of an attorney acting as his [or her] diligent conscientious advocate.’ [Citations.]” (*Ibid.*) The burden of proving a claim of ineffective assistance of counsel is squarely upon the defendant. (*People v. Camden* (1976) 16 Cal.3d 808, 816.) “ ‘In order to demonstrate ineffective

assistance of counsel, a defendant must first show counsel's performance was "deficient" because his [or her] "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he [or she] must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' ' ' (In *re Harris* (1993) 5 Cal.4th 813, 832-833; *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693] (*Strickland*).)

With this standard in mind, we shall assess each claim of prosecutorial misconduct in order to determine whether or not counsel's failure to object fell below an objective standard of reasonableness, and if so, whether or not defendant has demonstrated he suffered prejudice.

## C.

### *Analysis*

Defendant's claims of prosecutorial misconduct fall into five categories: (1) arguing facts not in evidence, (2) misrepresenting the record, (3) arguing defendant's bad character, (4) disparaging both defendant and defense counsel, and (5) appealing to the jury's passion and prejudice. We address each in turn.

#### **1. *Arguing Facts Not in Evidence***

During her closing argument, while describing the murder for the jury, the prosecutor stated: "We know there were multiple shots fired. We know, according to all the evidence presented, it was boom, boom, boom, boom. It was just sequential. So then the defendant had to have hands on the victim at the time he was shot. It's the only thing that makes sense how he would get shot. So you have to look at that and decide what was he doing with his hands on the victim at the time that the victim got shot. Was he

facilitating, positioning for him to get ambushed by [Roessler]? Was he still trying to get the victim into yet more of a vulnerable position? But you do know he had to have been hand-to-hand with the victim at the time that the victim was shot. It's the only thing that makes sense if the shots were all sequential and he gets shot." The prosecutor continued: "And are you really going to suggest that when they are in fighting movement, without any -- without this defendant doing anything else, that Roessler was able to walk up to [Lawrence], who is bigger than him, put the gun up to his neck and be able to shoot him like that without having to be restrained in some fashion? It doesn't even make sense. It just doesn't."

Later in the argument, the prosecutor argued based on Lawrence's height and the trajectory of the gunshot wound that he "had to be in a -- in a held position," adding, "a standard position, not in a position of movement, because it would not have trajectoried in that fashion." Still later, the prosecutor argued: "The only thing about him getting shot is that that was the one thing that no one expected to happen, that they didn't anticipate. That was the one thing they didn't anticipate. . . . They didn't anticipate when he was holding them on, that he too was going to be a subject of one of those gunshots."

Defendant argues there was no evidence in the record supporting the prosecutor's repeated claim that he "held [Lawrence] in place while [Roessler] shot him." "The prosecutor should not, of course, argue facts not in evidence.' [Citation.] However, 'the prosecutor has a wide-ranging right to discuss the case in closing argument. [She] has the right to fully state [her] views as to what the evidence shows and to urge whatever conclusions [she] deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to decide.' [Citation.]" (*People v. Tully* (2012) 54 Cal.4th 952, 1043.)

Here, the prosecutor's assertion that defendant and Lawrence were involved in hand-to-hand combat when Roessler fired the fatal shots was overwhelmingly established by the evidence. She then, however, asked the jury to consider whether or not defendant was "positioning" Lawrence so that Roessler could more effectively shoot him, and thereafter argued the manner in which Lawrence was shot did not make sense unless defendant was restraining him when Roessler fired. We agree the manner of the shooting does not support a logical conclusion defendant *must* have been restraining Lawrence. However, nor does the evidence foreclose this as a possibility. Defendant may have been doing so. Or he may have simply been drawn into a fistfight with Lawrence before Roessler was able to pull out the gun, and thereby found himself in the line of fire. Which scenario actually occurred was for the jury to decide. There was no misconduct.

## ***2. Misrepresenting the Record***

Defendant also takes issue with the prosecutor's statement, in her rebuttal argument, that while Lawrence made "bad decisions" the night he was murdered, "not one of those bad decisions by [Lawrence] involved violence. Not one." Defendant claims this argument "was false and deceptive." Not so.

While it is true a prosecutor commits misconduct by using "deceptive or reprehensible methods of persuasion" (*People v. Doolin* (2009) 45 Cal.4th 390, 444), here, there was evidence in the record supporting the prosecutor's argument that Lawrence did not instigate any violence the day he was murdered. While Lawrence returned to the bar to confront Roessler about what Roessler had previously said to him, and while Wilson and the other bar patrons expected there to be a fight, the confrontation between the two ended after an exchange of words and a shaking of hands. E. pushed Roessler during the confrontation, but there is nothing in the record suggesting Lawrence intended for her to do so.

Nevertheless, relying on a statement the bartender provided to police, defendant asserts Lawrence “demand[ed] a fistfight” with both Roessler and Wilson, and argues this demand “involved violence.” However, this prior statement from the bartender was admitted into evidence for its truth because she previously testified she did not “personally ever see [Lawrence] ever challenge those two to fight.” Thus, there was a conflict in the evidence as to whether or not Lawrence challenged Roessler and Wilson to fight. The prosecutor was well within the bounds of proper argument when she argued to the jury that Lawrence did not resort to violence that night. Defendant also cites J.’s throwing of the beer can at defendant and Roessler as they rode past Lawrence’s house, but as with E., there is nothing in the record suggesting Lawrence intended for him to do so. The prosecutor’s argument focused on Lawrence’s decisions, not those of his companions. Finally, defendant acknowledges, “the evidence was conflicted on who resorted first to violence” in front of Lawrence’s house that night. The prosecutor did not commit misconduct in arguing Lawrence’s decisions that night did not involve violence.

Defendant further asserts the prosecutor “made false claims” when she characterized defendant’s testimony that he handed the gun to Wilson when he got to the bar. The prosecutor argued as follows: “I was going to give it to either [Roessler] or [Wilson], whoever I could get to be responsible for it. . . . Walked up to [Wilson], gave him a gun, whispered the gun is in my pocket if you want it. [Wilson] took the gun, wrapped it up in his vest, took it over towards [Delgado’s] van and did not see it until after that. Doesn’t even make sense. [¶] So now magically in a vacuum he gives it to him, he takes off his vest that he knew he was wearing when the victims all were over there earlier, had taken off and laid across his bike. And now magically, without his knowledge, without him seeing it, without him ever knowing it, it ends up in the hands of

Roessler . . . before they go out on their motorcycle ride within, depending on which statement you believe, 10 to 15, maybe 20, maybe 30 minutes of his arrival.”

Defendant takes issue with two aspects of these statements. First, defendant points out he did not testify he “whispered” to Wilson when he handed the gun to him. While true, we do not believe the jury would have taken this comment literally. The prosecutor was mocking defendant’s story about handing the gun to Wilson rather than to Roessler. (See *People v. Perez* (2017) 18 Cal.App.5th 598, 625-626 [mocking defense argument not considered misconduct].) However, even if technically a misstatement of the record, it was de minimis and no basis for reversal. (See *People v. Osband* (1996) 13 Cal.4th 622, 695 [de minimis misconduct not prejudicial].) Second, defendant argues neither he nor Wilson testified they took off a motorcycle vest. This is also true. However, we do not construe the prosecutor’s argument as suggesting defendant, rather than Wilson, took off his vest. The argument is unclear in this regard, to be sure, but we interpret it to be referring to Wilson. And while Wilson denied taking off his vest during the confrontation between Lawrence and Roessler, E. testified he took off his vest and placed it on his motorcycle when he exited the bar with Roessler immediately before the confrontation. Thus, the record supports the prosecutor’s reference to him having done so.

Later in the rebuttal argument, the prosecutor further challenged defendant’s testimony that he gave the gun to Wilson. In response to defendant’s testimony that he assumed Roessler wanted Wilson to carry it for him because Wilson’s motorcycle had “locking saddlebags,” the prosecutor argued: “I’m going to challenge you to look at that motorcycle, the one that ended up out there in the cornfield. And I’m going to challenge someone to find some lock on the saddle bags. Because that was yet another -- even though, remember, it’s what the defendant testified. I figured he would just put them in the saddle bags because they have a lock.” Defendant argues this misrepresents the

record because defendant, after saying, “locking saddlebags,” clarified that what he meant was two locking “belt loop like straps” on the saddlebag. According to defendant, the prosecutor should have said, “locking straps” instead of “lock.” He cites no authority, nor have we found any on our own, requiring such linguistic precision in a closing argument.

Defendant further asserts the prosecutor misrepresented the record when she argued, “the motive for the shooting was ‘disrespect.’ ” Defendant claims there was “no evidence that [Roessler] felt disrespected.” He is mistaken. As previously set forth in greater detail, Wilson testified Roessler was frustrated by the confrontation with Lawrence and irritated he was pushed by a woman outside the bar. It was not unreasonable for the prosecutor to argue Roessler’s frustration and irritation were due to him feeling disrespected. Whether that was the case was for the jury to decide.

Nor do we agree with defendant’s claim the prosecutor misrepresented a portion of the testimony of Verizon’s analyst who testified concerning the call detail records for Wilson’s cell phone. The prosecutor argued: “The representative never said that the only way you can tell if a call was answered is by looking at a billing record.” This is true. Defendant sets forth the relevant testimony in his briefing and we decline to recount it all here. It will suffice to note the analyst testified the most accurate way to determine whether or not a call was answered is to look at the billing records, and the call detail records would not show on the face of the records whether or not a call was answered. However, she also testified: “Oftentimes you would look at the duration to see how long that call is. At some point, if you have a call that’s three minutes, it’s not ringing for three minutes . . . .” In other words, while the call detail records do not state on their face whether or not a call was answered, one can make reasonable assumptions based on the call details set forth therein. We conclude this was all the prosecutor was saying in this

portion of her argument. In any event, she immediately advised the jury to have that portion of the testimony read back if they had a question. This was not misconduct.

### ***3. Arguing Defendant's Bad Character***

Defendant argues the following portions of the prosecutor's argument urged the jury to convict him of first degree murder because he "was a person of bad character who associated with persons of bad character." We set forth the challenged argument in detail:

"In regards to the mental state, the aider and abettor must share the requisite intent with the [perpetrator], meaning we know that Roessler is the one who pulled the trigger. So you have to find that this defendant shared the same mental state, meaning he wanted that gun to be fired to kill [Lawrence]. An aider and abettor will share the perpetrator's specific intent when he knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the crime. How much more assistance can you give than providing the heat? Really, ladies and gentlemen. Because the reality of it is that [Lawrence] would be alive if this defendant never went to the Islander Bar and never took that .45, that loaded .45, because Roessler and Wilson weren't going to do it alone.

"I mean after all, Wilson lived in the same city. He could have gone to his house and gotten that .9 millimeter. They could have called [Delgado] and had him bring a gat. But he didn't. He lived right there in Lathrop. So you have to really, really sit down and be realistic and question yourself. Why are they calling him, mister gun broker, mister always got the gun? Why him? Because he's the man to do it. Because he's the man -- I mean, at least he's smart enough not to bring his own, right, because they are registered to him. Now we have a firearm that's used that he's saying belongs to [Roessler]. That's how he's explaining that he had it in his possession. He has his dad that will tell you the

same thing. Okay. How about we believe that? He brings an unregistered gun that ultimately commits murder.

“So you have to look at what [is] the intended crime? We have to look at the facts. We know that Roessler and this defendant committed the crime. Do the facts show that [Wilson] knew they intended to commit the shooting? Doesn’t it make sense -- and, you know, hey, [Wilson] is his people, okay. I mean, think about it. They all have the same uniform. They all feel . . . important. So we have [Wilson] with metal knuckles and a ball-peen hammer. We’ve got the defendant with a knife. You can look at that all you want to see whether or not you’re going to find that that can double as a screwdriver as the defendant wants you to believe. And what is it about your life [that] you have to go out there with all of these things? When all you’re doing is celebrating the birth of your child that you probably won’t be there for because you’re out drinking with your buddies.

“This is what I’m talking about. Common sense. It must be really difficult to sit as a human being who doesn’t live this lifestyle. Because when you think about it, you -- you’re thinking you -- you reject -- we really by nature reject unreasonableness. We reject it. We think, I don’t live that way, I wouldn’t have to go to a bar and have to take a gun and have to take a knife and be with my homeboys who have all their weapons. This isn’t about you. This is about him. This is about his choices, his life, his friends. He picked them. [Roessler] and [Wilson] is his people. Doesn’t matter how long he claims he knew [Wilson]. He was going out there to be with them for a purpose and it wasn’t to be hanging around and having some cocktails. Because why would you leave so quickly then? I mean, really look at all the factors. If you really look at it and think about it -- look back at the graph, look back at the facts of the texts.”

Later in the argument, the prosecutor stated: “You know what they are? They’re bullies. They think that they can go anywhere they want and do anything they want to

anyone they want without consequences. And apparently little [Roessler] was such a wimp he couldn't even handle his business like a man."

Still later, the prosecutor stated: "[Wilson] and [Roessler] had choices over the hour to hour and a half they ultimately waited for this defendant to come. And they could have procured a firearm a whole lot faster than waiting for him, but they needed him. They needed him because they knew that he was going to have the ability and the guts to do what it took to accomplish their goal. He's bigger. He's older. He has guns, all kinds of guns, that are unregistered. I mean, it really is a perfect storm if you think about it."

Finally, during the rebuttal argument, the prosecutor stated: "If you're innocently going to a bar to have drinks with your friends, you don't need knives, you don't need guns, you don't need hammers, and you don't need metal knuckles, unless you're looking for something." She also noted defendant, Roessler, and Wilson "go and shoot together, they go and ride together, they carry guns together, they do all that kind of thing."

While a prosecutor may not urge "the jury [to] draw inferences concerning defendant's guilt from conclusions regarding defendant's general bad character," she "is entitled to make a vigorous argument, and 'opprobrious epithets' may be employed if 'reasonably warranted by the evidence.'" (*People v. Dykes* (2009) 46 Cal.4th 731, 774, quoting *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030 [noting cases permitting argument describing the defendant as an "animal," "professional robber," or "vicious gunman"].)

Proceeding paragraph by paragraph, we perceive nothing improper in the first challenged paragraph. The prosecutor simply set forth the required mental state for aiding and abetting a first degree murder and then argued defendant aided in the commission of that crime by "providing the heat," using the very language defendant

used in his text message to Roessler. In the second challenged paragraph, the prosecutor pointed out Roessler had other options for obtaining a gun that night, including Wilson and Delgado, but chose defendant. This is supported by the evidence. She then asked why, referring to defendant as “mister gun broker” and “mister always got the gun,” and answered her own question: “Because he’s the man to do it. Because he’s the man -- I mean, at least he’s smart enough not to bring his own, right, because they are registered to him.” We conclude this was fair comment on the evidence. In addition to the text messages concerning the .32-caliber firearm Wilson tried to buy from defendant, Wilson himself testified he tried to buy that gun from defendant. Defendant also testified he attempted to broker a gun sale between Wilson and a friend of his who owned a .32-caliber firearm. Referring to defendant as “mister gun broker” and “mister always got the gun” was based on this evidence and was not misconduct. Moreover, the gun defendant brought Roessler that night was not registered, supporting the prosecutor’s argument that defendant, knowing the purpose for which Roessler intended to use the gun, was smart enough not to bring him a gun registered to defendant.<sup>9</sup>

Turning to the third and fourth challenged paragraphs, the prosecutor argued defendant, Roessler, and Wilson wore “the same uniform,” referring to motorcycle vests, and carried various weapons that night, “Wilson with metal knuckles and a ball-peen hammer” and “defendant with a knife.” Defendant does not dispute these comments are

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<sup>9</sup> The same reasoning applies to the “bullies” comment made in the fifth challenged paragraph. This disparaging remark, and the prosecutor’s clarification of it, i.e., “[t]hey think that can go anywhere they want and do anything they want to anyone they want without consequences,” was reasonably warranted by the evidence of how Roessler treated Lawrence when he went into the bar to purchase beer. Moreover, referring to Roessler as a “wimp” was further warranted by his conduct seeking out defendant to supply him with a gun because he was mad about how the subsequent confrontation turned out, particularly his having been pushed by Lawrence’s wife.

supported by the evidence. Instead, he argues the prosecutor used these facts, together with the subsequent comments about defendant's "lifestyle" and referring to Roessler and Wilson as "his people," to argue "that a conspiracy to murder existed because 'his people' carried weapons, and . . . went around spoiling for a fight." We agree these comments crossed the line into asking the jury to draw impermissible inferences based on defendant's character. (See *People v. Henderson* (1976) 58 Cal.App.3d 349, 360 ["possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons—a fact of no relevant consequence to determination of the guilt or innocence of the defendant"]; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1392-1393 [same]; see also *People v. Memory* (2010) 182 Cal.App.4th 835, 859 [evidence of the defendants' membership in a motorcycle club improperly admitted to show propensity to fight with deadly force when confronted].) The same sentiment was expressed by the prosecutor during rebuttal. This was also misconduct.

Finally, the comments made in the sixth challenged paragraph repeated those made in earlier paragraphs. The prosecutor repeated that Roessler and Wilson had options that night, but chose to have defendant bring a gun, suggesting they "needed him" because he was bigger, older, and had "the ability and the guts to do what it took to accomplish their goal," again repeating that defendant "has guns, all kinds of guns, that are unregistered." She started out on solid footing, for reasons expressed in our rejection of defendant's prosecutorial misconduct claim involving the second challenged paragraph. However, after overstepping in the third and fourth challenged paragraphs, ending this one by suggesting defendant "had the guts" to murder Lawrence because he possessed a cache of unregistered firearms at his house again crossed the line into misconduct. Moreover, a search of defendant's house uncovered two handguns, both registered to defendant.

We address the prejudice flowing from these improper comments later in this opinion.

#### ***4. Disparaging Defendant and Defense Counsel***

Defendant claims the prosecutor “disparaged defense counsel and accused him of aiding [defendant] in fabricating a defense during her rebuttal argument.” We decline to set forth this challenged portion of the argument in its entirety. It will suffice to note she accused both defendant and “a criminal defense attorney” of testifying in an “[a]rrogant” and “argumentative” way, “always wanting to explain their improper conduct.” We conclude these comments were directed towards Wilson’s former defense attorney, who testified as a defense witness, not defendant’s trial counsel. For this reason, cases holding a prosecutor may not accuse defense attorneys in general of being liars, or the defendant’s attorney in particular of lying to the jury (see *People v. Young* (2005) 34 Cal.4th 1149, 1193), are inapposite. The prosecutor argued the jury should not believe defendant’s testimony or that of Wilson’s defense counsel based in part on their demeanor while testifying. This was not misconduct. (See, e.g., *People v. Sandoval* (1992) 4 Cal.4th 155, 180 [not misconduct to refer to testimony as “lies” where “based on the evidence on not on the prosecutor’s personal belief”].)

#### ***5. Appealing to Passion and Prejudice***

Finally, defendant asserts the prosecutor appealed to the jury’s passion and prejudice when she argued: “And why are you being feared into what your required duty is? Because this isn’t a mystery. You take the facts and the evidence, you have to apply it to the law, and you come to a decision. That’s it. It’s not about -- you don’t consider [Lawrence’s daughter’s] fatherless nature. Why would you even have that brought up to you? It’s not for your consideration. It’s not for your discussion.”

As the Attorney General points out, these comments were directly responsive to arguments made by defense counsel during his closing argument. The “feared” comment

was in response to defense counsel's statement that the prosecutor was using a "ploy" to convict him of murder, by overcharging him with murder rather than with the assault he admitted committing on Lawrence, adding: "They don't want you to find him guilty of what he did. [¶] . . . We want you to find him guilty of murder. And if you don't find him guilty of murder, then live with your conscience and let a guilty man go." The prosecutor's comment about Lawrence's daughter was also in response to defense counsel's statement: "[Lawrence's daughter] is going to grow up without a father. I can't imagine what it's like." Viewing the prosecutor's comments in their totality, the prosecutor told the jury to not allow defense counsel's argument to prevent them from doing their duty, i.e., applying the law to the facts and determining whether or not defendant committed murder. The prosecutor also asked the jury to do so without considering any sympathy they might have for Lawrence's daughter. This was not misconduct.

## **6. Prejudice**

As mentioned, defendant has forfeited his claims of prosecutorial misconduct. We must therefore determine whether or not trial counsel's failure to object to the misconduct noted above resulted in prejudice under *Strickland, supra*, 466 U.S. 668. In other words, is there a reasonable probability that, but for the failure to object to the misconduct and ask for curative instructions, the result of the proceeding would have been different? (See *In re Harris, supra*, 5 Cal.4th at pp. 832-833.)

The only misconduct revealed by our review of the prosecutor's arguments are her brief references to defendant's "people," the unrelated weapons carried by defendant and Wilson the night of the murder, and the unrelated firearms defendant possessed at his house. While we do not take these comments lightly, we conclude they "would not have affected the outcome or fairness of the trial in light of the overwhelming evidence of guilt

introduced by the prosecution and defendant's own testimony." (*People v. Dykes, supra*, 46 Cal.4th at p. 774.)

#### DISPOSITION

The judgment is affirmed.

\_\_\_\_\_/s/  
HOCH, J.

We concur:

\_\_\_\_\_/s/  
RAYE, P. J.

\_\_\_\_\_/s/  
BLEASE, J.